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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 RAELENE C.

10 Plaintiff,

11 v.

12 ANDREW M. SAUL,
Commissioner of Social Security,

13 Defendant.

CASE NO. C19-5540-MAT

ORDER RE: SOCIAL SECURITY
DISABILITY APPEAL

14 Plaintiff proceeds through counsel in her appeal of a final decision of the Commissioner of
15 the Social Security Administration (Commissioner). The Commissioner denied plaintiff's
16 applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after
17 a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the
18 administrative record (AR), and all memoranda of record, this matter is REMANDED for further
19 administrative proceedings.

20 **FACTS AND PROCEDURAL HISTORY**

21 Plaintiff was born on XXXX, 1965.¹ She completed high school and previously worked
22 as a housekeeper and housekeeping laundry worker. (AR 86, 108-09.)

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¹ Dates of birth must be redacted to the year. Fed. R. Civ. P. 5.2(a)(2) and LCR 5.2(a)(1).

1 Plaintiff protectively filed DIB and SSI applications in August 2016, alleging disability
2 beginning July 30, 2015. (AR 239, 256.) The applications were denied at the initial level and on
3 reconsideration. On March 15, 2018, ALJ Rebecca Jones held a hearing, taking testimony from
4 plaintiff and a vocational expert (VE), and plaintiff amended the alleged onset date to November
5 20, 2015. (AR 76-114.) On June 27, 2018, the ALJ found plaintiff not disabled. (AR 30-39.)

6 Plaintiff timely appealed. The Appeals Council denied plaintiff's request for review on
7 April 22, 2019 (AR 1-6), making the ALJ's decision the final decision of the Commissioner.
8 Plaintiff appealed this final decision of the Commissioner to this Court.

9 **JURISDICTION**

10 The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

11 **DISCUSSION**

12 The Commissioner follows a five-step sequential evaluation process for determining
13 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must
14 be determined whether the claimant is gainfully employed. The ALJ found plaintiff had worked
15 after the alleged disability onset date, but that the work activity did not rise to the level of
16 substantial gainful activity. At step two, it must be determined whether a claimant suffers from a
17 severe impairment. The ALJ found plaintiff's degenerative disc disease of the lumbar spine severe.
18 Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ
19 found plaintiff's impairments did not meet or equal the criteria of a listed impairment.

20 If a claimant's impairments do not meet or equal a listing, the Commissioner must assess
21 residual functional capacity (RFC) and determine at step four whether the claimant has
22 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform
23 light work that does not require climbing ladders, ropes, or scaffolds, no more than occasional

1 climbing of ramps and stairs, and no more than the occasional ability to stoop, kneel, crouch, and
2 crawl. With that assessment, the ALJ found plaintiff able to perform her past relevant work as a
3 housekeeper and housekeeping laundry worker as that work is generally performed.

4 If a claimant demonstrates an inability to perform past relevant work, or has no past
5 relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant
6 retains the capacity to make an adjustment to work that exists in significant levels in the national
7 economy. With the assistance of the VE, the ALJ also found plaintiff capable of performing other
8 jobs, such as work as a clerical assistant, general cashier II, and small products assembler.

9 This Court's review of the ALJ's decision is limited to whether the decision is in
10 accordance with the law and the findings supported by substantial evidence in the record as a
11 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). *Accord Marsh v. Colvin*, 792 F.3d
12 1170, 1172 (9th Cir. 2015) ("We will set aside a denial of benefits only if the denial is unsupported
13 by substantial evidence in the administrative record or is based on legal error.") Substantial
14 evidence means more than a scintilla, but less than a preponderance; it means such relevant
15 evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v.*
16 *Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of
17 which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278
18 F.3d 947, 954 (9th Cir. 2002).

19 Plaintiff argues the medical opinion of a doctor submitted to the Appeals Council warrants
20 remand and that the ALJ erred in rejecting lay evidence and her subjective claims. She also
21 questions, with no further argument, whether the RFC and hypothetical questions to the VE were
22 complete to support the step five finding. Plaintiff requests remand for further administrative
23 proceedings, including a de novo hearing, update of records, re-contacting for medical source

1 statements, and medical and vocational expert testimony, adding that an orthopedic medical expert
2 would be particularly useful. The Commissioner argues the ALJ's decision has the support of
3 substantial evidence and should be affirmed.

4 Evidence Submitted to Appeals Council

5 After the ALJ issued the decision, plaintiff submitted additional evidence to the Appeals
6 Council. (AR 2, 8-20, 45-74.) The Appeals Council declined to exhibit the evidence upon
7 concluding it did not show a reasonable probability of changing the outcome of the decision. (*Id.*)
8 Plaintiff disagrees with this conclusion in relation to an opinion from orthopedic surgeon Thomas
9 Gritzka, M.D. (AR 8-16.)

10 Evidence submitted to the Appeals Council becomes part of the administrative record for
11 the purposes of this Court's review. The Court considers the evidence in reviewing the ALJ's
12 decision for substantial evidence. *See Brewes v. Comm'r of Social Sec. Admin.*, 682 F.3d 1157,
13 1163 (9th Cir. 2012) (“[W]hen the Appeals Council considers new evidence in deciding whether
14 to review a decision of the ALJ, that evidence becomes part of the administrative record, which
15 the district court must consider when reviewing the Commissioner's final decision for substantial
16 evidence.”).²

17 Dr. Gritzka examined plaintiff on September 12, 2018 and issued an opinion dated October
18 2, 2018. (AR 8-16.) He reviewed a number of medical records and outlined findings on
19 examination as including, *inter alia*, tenderness to palpation over right posterior iliac spine and
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21 ² Plaintiff argues the opinion of Dr. Gritzka supports a remand under sentence four or, alternatively,
22 sentence six of 42 U.S.C. § 405(g). Under sentence four, a court may remand with a judgment affirming,
23 modifying, or reversing the decision of the ALJ. 42 U.S.C. § 405(g). Under sentence six, a court may
remand for consideration of “new evidence which is material” and where there is “good cause for the failure
to incorporate such evidence into the record in a prior proceeding.” *Id.* In this case, while not exhibited,
the Appeals did consider the new evidence in reaching the conclusion it did not show a reasonable
probability of changing the outcome of the decision. (AR 2.) As such, the Court, like the Commissioner,
considers the evidence pursuant to sentence four.

1 upper sacroiliac joint, the ability to walk without a limp or list, walk on her tiptoes and heels and
2 do a full deep knee bend, reduced lumbar flexion and extension and lateral lumbar flexion, full
3 strength throughout both lower extremities, pain with internal and external rotation of the right
4 hip, and other findings of pain with hip flexion, worse on the right than the left. (AR 8, 12-13.)
5 He diagnosed (1) chronic lumbosacral sprain superimposed on L2-3, traumatic degenerative disc
6 disease and unstable spondylolisthesis, (2) right sacroiliac joint derangement, and (3) right femoral
7 acetabular impingement, and described the second and third of these diagnoses as “most likely to
8 be currently contributing to the examinee’s symptomatology or causing her functional
9 impairment.” (AR 14.)

10 Dr. Gritzka opined that, based on his review of medical records and imaging reports, the
11 examination, and his expertise, plaintiff had been unable to perform even sedentary work on a
12 regular or sustained basis, five days a week, and that either a sacroiliac joint derangement or a
13 femoral acetabular labral tear or symptomatic osteoarthritis of the hip “would prohibit her from
14 sitting or doing even sedentary work.” (AR 14-15.) He stated: “Individuals with significant
15 sacroiliac joint injuries and femoral acetabular impingement syndromes do not tolerate prolonged
16 sitting.” (AR 15.) He estimated plaintiff would be able to stand and walk on level ground for
17 fifteen minutes at a time, sit for approximately thirty minutes before having to change positions,
18 and lift about ten pounds on an occasional basis. He found plaintiff limited to a total of sitting
19 about four hours in an eight-hour day and standing or walking about two hours per day, and lifting
20 five pounds frequently and ten pounds occasionally. Plaintiff also needed unscheduled breaks
21 intermittently throughout the day, for about fifteen minutes at a time, to lie down or recline. Dr.
22 Gritzka found plaintiff’s complaints reasonable and credible in light of the diagnoses, adding that,
23 while the diagnosis is “not yet completely defined[,]” plaintiff “does, however, have some physical

1 findings consistent with femoral acetabular impingement syndrome which have not been evaluated
2 or treated at this time.” (*Id.*) He stated that, if plaintiff attempted even sedentary work, her
3 combination of impairments would probably have resulted in absenteeism about four days per
4 month, and plaintiff would have “off task” behavior and be unable to concentrate due to her pain,
5 specifically her buttock and to a greater extent her right hip pain. (*Id.*) He opined plaintiff had
6 been unable to work since November 20, 2015.

7 Plaintiff asserts the evidence from Dr. Gritzka likely would change the outcome of this
8 case. She points to the fact Dr. Gritzka established more severe impairments than the ALJ,
9 including two impairments – sacroiliac joint derangement and femoral acetabular impingement
10 syndrome – the ALJ did not consider, as well as his identification of new limitations, including
11 additional breaks to lie down and four absences per month.

12 The Commissioner denies the evidence from Dr. Gritzka undermined the substantial
13 evidence support for the ALJ’s decision. The Commissioner notes that, while the ALJ did not
14 include the new diagnoses at step two, both conditions are related to plaintiff’s back and hip
15 complaints and the ALJ fully considered those complaints at step four. (*See* AR 34.) *See also*
16 *Lewis v. Astrue*, 489 F.3d 909, 911 (9th Cir. 2007) (failure to list impairment as severe at step two
17 harmless where limitations considered at step four). The Commissioner rejects the contention
18 regarding additional limitations identified by Dr. Gritzka, asserting the ALJ considered and found
19 unreliable similar opinions of limitations upon finding them inconsistent with the evidence. The
20 Commissioner notes, as an example, the ALJ’s rejection of the opinion of Dr. Brent Packer, M.D.,
21 that plaintiff would be limited in her ability to maintain regular work attendance and perform
22 postural activities. (AR 36, 476.)

23 Plaintiff, in reply, states Dr. Gritzka identified evidence of additional impairments causing

1 loss of functioning and range of motion and movement, not just increased symptoms. She argues
2 the additional functional deficits identified by Dr. Gritzka undermine the ALJ's decision by both
3 adding an objective, clinical basis for a further reduced RFC and supporting plaintiff's subjective
4 claims. The Court, for the reasons set forth below, finds further proceedings necessary.

5 In July 2016, Dr. Packer found plaintiff able to perform sedentary level work, with only
6 moderate limitations in two categories – postural restrictions and performing activities within a
7 schedule, maintaining regular attendance, and being punctual. (AR 486.) The limitation to
8 sedentary work included the ability to lift ten pounds maximum, frequently lift or carry small
9 articles, sit for most of the day, and walk or stand for brief periods.

10 The ALJ assigned the opinion of Dr. Packer little weight. (AR 36.) She noted Dr. Packer
11 did not have the benefit of examining plaintiff, that his opinion appeared to be solely based on
12 review of certain 2016 records, and that he did not consider other evidence in the record. She
13 found the opinion inconsistent with other records showing plaintiff demonstrates a normal gait, is
14 able to engage in heel and toe walking without difficulty, and presents in no acute distress. (*Id.*
15 (citing AR 497, 500, 549, 602, 616, 621, 625, 629, 641, 669, 704).) She noted inconsistency with
16 the opinions of Drs. Greg Saue and Guillermo Rubio, two State agency medical consultants who
17 had access to additional records in rendering their opinions, in November 2016 and January 2017
18 respectively, that plaintiff could perform light work and frequently engage in all postural activities,
19 but is unlimited in balancing. (*See* AR 129-130, 140-41.) Finally, noting there were no allegations
20 of psychological impairments, the ALJ found Dr. Packer's opinion of difficulty performing
21 activities within a schedule and maintaining regular attendance unsupported even by plaintiff's
22 allegations.

23 Unlike Drs. Packer, Saue, and Rubio, Dr. Gritzka examined plaintiff. (*See* AR 8-9.) The

1 ALJ did not have a medical opinion from an examining or treating provider to consider and was
2 limited to consideration of the opinions from the three non-examining doctors. (*See* AR 36.)
3 While Dr. Gritzka did not examine plaintiff until two-and-a-half months after the ALJ issued her
4 decision, he did relate his opinions back to the time period considered by the ALJ. (*See* AR 8, 15,
5 39.) Dr. Gritzka also, unlike Dr. Packer, had access to a substantial number of medical records,
6 including records from examining and treating providers not available at the time of review by
7 Drs. Saue and Rubio. (*See, e.g.*, AR 8-9, 640-41 (Dr. Lamar Ruppenthal, on June 29, 2017, found
8 both paraspinal tenderness and spasm with myofascial trigger points and increase in axial lower
9 back pain with pelvic rocking, knees to chest and right greater than left hip flexor pain with related
10 weakness; identifying impression of “chronic lower back pain, severe L2-3 degenerative disc
11 disease, right L5 radiculopathy, lumbar myofascial pain/facet syndrome and potential right SI J
12 dysfunction.”); AR 708 (Dr. Yavari Rad, on January 8, 2018, stated: “The patient’s presentation
13 is complex and seems to be multifactorial. Her pain is chronic and started in 2015. . . . Her pain
14 across lumbar area seems to be related to L2-3 DDD, facet arthropathy or segmental instability.
15 Pain in the right lumbosacral junction gluteal area could be related to spondylosis or SI joint.
16 Piriformis syndrome is on differential diagnosis as well. . . .”).) Dr. Gritzka also found plaintiff
17 more physically limited than opined by Dr. Packer and specifically tied assessed limitations in
18 absenteeism, off-task behavior, and inability to concentrate to pain from plaintiff’s physical
19 impairments. (*See* AR 15.)

20 The Court, in sum, finds the evaluation from Dr. Gritzka to undermine the substantial
21 evidence support for the ALJ’s decision. This matter is subject to remand for further consideration
22 of the medical record, including the evidence submitted to the Appeals Council.

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CONCLUSION

For the reasons set forth above, this matter is REMANDED for further administrative proceedings.

Mary Alice Theiler
United States Magistrate Judge